on demand, or upon the date to which it has been posted. Therefore, the only effect of a receipt of payment by a cheque is an acknowledgment that a promise to pay has been given by the drawer to the drawee. The receipt does not extinguish or release any legal right and is not a valuable security even within the last part of section 30. Where, therefore, a person gives a post-dated cheque in payment for goods already received and the cheque is dishonoured, there is only a breach of promise for which the remedy lies in a Civil Court, but the person cannot be held guilty of cheating. The giving of a cheque in lieu of money due even with the knowledge that the drawer has no funds in the bank does not amount to cheating. If the accused intended to deceive the complainant by falsely inducing him to believe that the cheque would be honoured, there is deception, but deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to or omit to do anything which he would not do or omit to do but for the deception".

The questions therefore which have to be asked and answered are:—

(1) What was the complainant induced to do or to omit to do?

(2) What was the deception which constituted the inducement?

(3) Did this induced commission or omission on his part cause or was it likely to cause him some harm or damage in body, mind, reputation or property?

The answer to question (1) according to the charge is that he was induced to allow payment for radios and other goods by post-dated cheques instead of cash. The answer to question (2) does not appear from the charge. Presumably it was making the complainant believe that the cheques would be honoured. Assuming that to be the correct answer to question (2), what is the correct answer to question (3)?

It was argued by the learned Deputy that the complainant had been deceived into accepting these post-dated cheques because he believed they would be honoured, he would not have done that if he had known that the cheques would be dishonoured, and he had therefore suffered damage because he had thereby foregone his right immediately to institute civil proceedings.

The answer to this argument is in my view that the damage spoken of must be the proximate result of the act complained of. If it is a mere possibility and not a necessary consequence of the act an essential element of the offence of cheating is not satisfied. (*Gour*, Penal Law of India, 6th Edition, Volume 3, page 1982). But in any event there was no evidence that it was ever in the contemplation of the complainant that by accepting the post-dated cheques he was foregoing his right immediately to institute civil proceedings, nor was there any evidence whatever that this caused or was likely to cause him any damage.

On the facts of this case assuming that it was a cash transaction it is quite clear that the liability to pay $14,000 for the goods arose when they were delivered on the 15th August, 1962. As from that date the money was due. If he had known on the 18th August, 1962, that the cheques would be dishonoured he would not, of course, have accepted them. But by accepting them on the 18th August, 1962, he did not put himself in any worse position than he had been from the moment when he had delivered the goods without receiving payment, and the purchase price had then become due, on the 15th August, 1962. Accordingly it could not be said that he had suffered any damage as a result of agreeing to accept on the 18th August, 1962, the post-dated cheques in payment, whether he had been dishonestly induced to do so or not.

But quite apart from that the charge does not specify what the deception was and in addition there was no evidence that the complainant was induced by any deception into accepting the post-dated cheques in payment.

I held that the charge was defective in that it did not specify the deception which had been practised, and as the goods were delivered and payment was due on the 15th August, 1962, in accepting the post-dated cheques on the 18th August, 1962, the complainant was in no worse position than he had been after the delivery of the goods on the 15th August, 1962, and accordingly he could not be said to have suffered any damage as a consequence of anything done on the 18th August, 1962.

Taking into consideration all the circumstances of this case I did not consider that it was a case in which I should order a retrial and accordingly I allowed the appeal and quashed the conviction and sentence.

Appeal allowed.

Solicitors: *Tan Lye Huat & Co.*

RATNA AMMAL & ANOR. v. TAN CHOW SOO

[O.C.J. (Hepworth J.) December 19, 1963]
[Penang — Originating Motion No. 13 of 1963]

Trade marks—Application for registration of trade mark by respondent—Agreement between respondent and applicants to develop sale of goods bearing said trade mark—Registration in name of respondent alone—Whether fraudulent—Whether deceptive to public—Rectification or variation of registration—Whether applicants entitled to.

Trade marks—Register—Object of maintaining.

The respondent on August 28, 1961 applied for the registration of the words "Saint Brand" and a device of an old man as a trade mark in respect of milk and other dairy products. On November 3, 1961, the respondent entered into an agreement with the applicants that they should constitute themselves into a syndicate whose object was to develop in various countries the sale of sweetened condensed milk to be supplied by Dutch manufacturers under the "Saint Brand" trade mark. On January 12, 1962, the syndicate entered into an agreement with a firm S.E.N. in which *inter alia* it was recited that

the syndicate was the sole distributor of sweetened condensed milk marketed under the "Saint Brand" trade mark.

The respondent's application was advertised in the Federal *Gazette* on June 3, 1962 and later a certificate of registration was issued to take effect from August 28, 1961 with the name of the respondent as the proprietor.

The applicants applied to have the registration rectified or varied by expunging the said registration or by entering the names of the applicants or the syndicate alone or the applicants and respondent together as the registered proprietors on the grounds that the respondent (a) alone did not use or had no *bona fide* intention to use the said trade mark for milk products or sweetened condensed milk and (b) had fraudulently procured the registration of the trade mark in his name without disclosing the agreement between himself and the applicants to the Registrar and this was calculated to deceive the public.

Held: (1) the agreement did not provide that the trade mark should be registered in the names of the parties thereto; in the absence of any such provision, the intention of the parties was that the trade mark should be registered in the name of the respondent as the owner and that its use should be regulated by the provisions of the agreement;

(2) the public has not been deceived into thinking that they were buying any other sweetened milk than those manufactured in Holland and imported by the respondent.

Case referred to:—

(1) *Ciba Ltd.* v. *M. Ramalingam & S. Subramaniam* A.I.R. 1958 Bom. 58.

ORIGINATING MOTION.

V. K. Palasuntharam for the applicants.

C. O. Lim for the respondent.

Cur. Adv. Vult.

Hepworth J.: This is a motion for an order:—

"1. That the Register of Trade Marks should be rectified and/or varied:—

(a) by striking out the respondent's name Tan Chow Soo and his purported trade name 'Soo Seng' and address and other particulars about him from the name, address and other particulars of the registered proprietor of trade mark No. M/36213;

(b) by entering the names of the applicants and their addresses and other particulars as the names, addresses and other particulars of the registered proprietors of the said trade mark No. M/36213; or

(c) alternatively to (b),

(i) either by entering the name 'Maha Syndicate' and its address and other particulars as the name, address and other particulars of the registered proprietor of the said trade mark No. M/36213,

(ii) or by entering the names of the applicants and the respondent and their addresses and other particulars as the names, addresses and other particulars of the registered proprietors of the said trade mark No. M/36213; or

(d) alternatively to (a) and (b),

(i) either by restricting the registration of the said trade mark No. M/36213 to milk and dairy products other than sweetened condensed milk.

(ii) or by expunging the registration of the said trade mark No. M/36213; or

(e) in such other manner as the court may think fit;

2. That the respondent do pay the applicants' costs of these proceedings."

During the course of argument it appeared that the applicants' principal prayer was that contained in paragraph (c) of prayer 1 either in the terms of sub-paragraph (i) or sub-paragraph (ii).

On the 28th August, 1961, the respondent applied to the Registrar of Trade Marks, Federation of Malaya, for the registration of the words "Saint Brand" and a picture of a bearded old man with a staff as a trade mark for milk and other dairy products.

In October, 1961, negotiations between the applicants and the respondent took place for the purpose of reaching agreement for them jointly to develop a business in sweetened condensed milk under "Saint Brand" or any other mark thereafter to be substituted therefor and that the applicants should finance the business. The results of these negotiations were embodied in an agreement dated the 3rd November, 1961, in which it was agreed that the applicants and the respondent should constitute a syndicate to be known as the Maha Syndicate, the object of the syndicate being to develop throughout the Federation of Malaya, Singapore, Sarawak, British North Borneo, Brunei, Indonesia, Thailand, Burma, Hongkong, Phillipines and French Indo-China the sale of sweetened condensed milk under the "Saint Brand" trade mark.

The provisions of the agreement which are immediately relevant read as follows:—

"AN AGREEMENT made the 3rd day of November, 1961, Between Tan Chow Soo the proprietor of the firm of Soo Seng Company of No. 48, Prangin Road, Penang, (hereinafter called the 'First Party') of the one part, and M. Ratna Ammal, widow and M. Ratnavale both of No. 19, Scotland Road, Penang, (together hereinafter called the 'Second Party') of the other part.

WHEREAS the First Party has applied to the Registrars of Trade Marks in Singapore and in the Federation of Malaya for the registration of a trade mark known as the 'Saint Brand' for use in connection with the sale of sweetened condensed milk.

AND WHEREAS the First Party has entered into an Agreement with the firm of Vecofa Verenigde Condensfabrieken of Gouda in the Kingdom of Holland who have agreed to manufacture sweetened condensed milk and supply the same in tins bearing the said trade mark and have appointed the First Party the sole selling agents of the same for distribution in the Federation of Malaya, Singapore, Sarawak, British North Borneo, Brunei, Indonesia, Thailand, Burma, Hongkong, Phillipines and French Indo-China (together hereinafter referred to as the 'said Area').

NOW IT IS HEREBY AGREED, as follows:—

1. The parties hereto shall constitute a Syndicate to be known as the Maha Syndicate, the object of the Syndicate being to develop throughout the said Area the sale of the said sweetened condensed milk to be supplied by the said manufacturers under the 'Saint Brand' trade mark, or any other mark which may hereafter be substituted therefor, and generally to carry on the business of import and export merchants.

.....

10. Neither party shall without the consent of the other:—

(a) either directly or indirectly engage or be concerned in the sale of any milk other than on behalf of the Syndicate.

(b) assign mortgage or charge his share in the capital assets or profits of the Syndicate.

....."

On the 12th January, 1962, the Maha Syndicate entered into an agreement with Sharikat Enchum Nasution of Kuala Lumpur whereby Sharikat Enchum Nasution were appointed sole distributors of the said "Saint Brand" milk in the State of Selangor. The only portions of this agreement to which it is necessary to refer are as follows:—

"AN AGREEMENT made this 12th day of January, 1962, Between Maha Syndicate of No. 48, Prangin Road, Penang, (hereinafter referred to as 'the Principal Concessionaries') of the one part and Sharikat Enchum Nasution of No. 84, Rodger Street, Kuala Lumpur, (hereinafter referred to as 'the Regional Concessionaires') of the other part.

AND WHEREAS the Principal Concessionaires are the sole distributors in South East Asia of sweetened condensed milk manufactured by Vecofa Verenigde Condensfabrieken, of Gouda in the Netherlands (hereinafter referred to as 'the Manufacturers') and marketed under the 'Saint' brand trade mark.

AND WHEREAS the Regional Concessionaires are desirous of being appointed sole distributors of the said 'Saint' brand milk in the State of Selangor (hereinafter referred to as 'the said Area').

AND WHEREAS the Principal Concessionaires have agreed to appoint the Regional Concessionaires sole distributors in the said Area of the 'Saint' brand milk.

NOW THIS AGREEMENT WITNESSETH as follows:—

.....

4. The Regional Concessionaires agree:—

.....

(v) That they shall promptly notify the Principal Concessionaires of any infringement or passing off of 'Saint' brand trade mark in the said Area and provide all assistance necessary to put a stop to any such infringement or passing off.

.....

5. The Principal Concessionaires agree:—

.....

(iii) That they will pay for and take all steps necessary to protect the use of the said 'Saint' brand trade mark on milk bought by the Regional Concessionaires under this Agreement.

.....

7. The Principal Concessionaires shall give the Regional Concessionaires adequate notice of any negotiations for the sale or disposal by the Principal Concessionaires of their rights to import and sell 'Saint' brand milk in South East Asia and if required by the Regional Concessionaires the Principal Concessionaires agree to make binding agreement with the person or persons acquiring the said rights of the Principal Concessionaires whereby the Regional Concessionaires' rights under this Agreement will be continued on the same terms."

On the 30th June, 1962, the respondent's application for registration of the trade mark was advertised in page 1220 of the *Federal Gazette* as Application No. M/36213. Later in 1962 the Certificate of Registration was issued and by virtue of the provisions of section 29 of the Trade Marks Ordinance, 1950, the said mark was deemed to have been registered with effect from the 28th August, 1961, under No. M/36213 with the name of the respondent as proprietor and his purported trade name "Soo Seng" and his address and particulars.

It is the applicants' case that before the application for registration was accepted in 1962 the respondent did not use or had no *bona fide* intention to use or at least did not himself alone use and had no *bona fide* intention that he himself alone would use the said trade mark for milk or dairy products or at least for sweetened condensed milk. The fact of the registration of the respondent as the proprietor of the said trade mark, the applicants submitted, was calculated to deceive when it was registered. The applicants allege that the respondent did not disclose to the Registrar of Trade Marks the agreement which had been come to between the applicants and the respondent for the formation of the Maha Syndicate as a result of which the respondent was not entitled to claim the exclusive use of the trade mark for milk and dairy products. The applicants allege that the respondent had procured the registration of the said trade mark in the name of himself alone as proprietor by fraud.

The applicants submit that they are aggrieved by non-insertion in and the omission from the register of trade marks of their names as proprietors of the said trade mark for milk and dairy products or of the name of the Maha Syndicate as proprietor of the said trade mark for milk and dairy products and by the entry without sufficient cause in the register of trade marks of the name of the respondent as proprietor of the said trade mark for milk and dairy products and of the entry of his purported trade name "Soo Seng" and his address and other particulars. The applicants allege that the name of the respondent as proprietor of the said trade mark for milk and dairy products and his purported trade name "Soo Seng" and his address and other particulars wrongfully remain in the said register and they are thereby aggrieved. The applicants submit that by virtue of the agreement of the 3rd November, 1961, the title to the trade mark has become vested in the partners of the Maha Syndicate and that this is recognised by paragraphs (a) and (b) of clause 10 of the agreement of the 3rd November, 1961, and by the first recital in the agreement of the 12th January, 1962, and also by paragraph (v) of clause 4, paragraph (iii) of clause 5 and clause 7 of that agreement.

What in effect the applicants are saying is that the registration of the trade mark with the name of the respondent as owner is deceptive

in that it leads the public to think that the respondent is the sole proprietor.

The applicants are making this application under section 46 of the Trade Marks Ordinance, 1950. Their case is that by virtue of the matters stated above the provisions of sections 19 and 23 of the Ordinance have been contravened, in particular in that the respondent did not inform the Registrar of the agreement of the 3rd November, 1961.

On behalf of the respondent it is submitted that the motion is not directed at expunging an offensive trade mark and that the applicants have no intention of removing the mark because they value it. What they are trying to do is to get themselves registered as proprietors either alone or together with the respondent. As I have already said it is conceded on behalf of the applicants that this is their main plea.

The respondent maintains that he has been using the "Saint Brand" trade mark since 1959, so it cannot be said he did not use it. He denies that he procured the registration of the trade mark in the name of himself alone as proprietor by fraud.

The respondent submits that the registration is not designed to deceive the public and the way in which the applicants' case has been argued is not in accordance with the way it has been pleaded by the applicants in the notice of motion and in his affidavit in support.

The respondent submits that all the cases which have been referred to by counsel for the applicants are cases in which there were two parties each with a similar trade mark. He submits that the agreement of the 3rd November, 1961, does not allow the Maha Syndicate to use the trade mark and does not divest the respondent of his title to it.

It is admitted that in pursuance of the agreement of the 3rd November, 1961, considerable business was carried on in 1962 and the beginning of 1963 by the Maha Syndicate in connection with the distribution and sale of "Saint Brand" sweetened condensed milk. The business was carried on by the applicants and the respondent. As a result the respondent was using the trade mark, the latter as a consequence of the terms of that agreement. The fact of the application for registration of the trade mark by the respondent was clearly in the minds of all concerned from the beginning as it is the first recital in the agreement of the 3rd November, 1961. At no time at least up to the end of March, 1963, does it appear that there was ever any complaint by the applicants as to the registration of the trade mark in the name of the respondent. It would appear that it was only when the parties fell out for some reason or other that the question as to the ownership of the trade mark was raised at all.

The agreement of the 3rd November, 1961, is an agreement drawn by a solicitor in which as I have already said the first recital refers to the application for registration of the trade mark by the respondent. Had it been the intention that the trade mark was to be registered in the name of the syndicate or in the names of the applicants and the respondent nothing could have been easier than to include provisions to that effect. It seems to me that in the absence of any such provisions in that agreement it was the clear intention of the parties that the trade mark should be registered in the name of the respondent as the owner and that its use by the applicants and the respondent should be regulated by the provisions of that agreement. In my opinion neither paragraphs (a) and (b) of clause 10 of the agreement of the 3rd November, 1961, nor the first recital of the agreement of the 12th January, 1962, and paragraph (v) of clause 4 and paragraph (iii) of clause 5 of that agreement necessarily recognise that the trade mark had become vested in the syndicate because they are equally consistent with the intention that the trade mark should be registered in the name of the respondent as the owner and that its use by the applicants and the respondent should be regulated by the provisions of the agreement of the 3rd November, 1961. The only clause which even remotely supports this contention of the applicants is clause 7 of the agreement of the 12th January, 1962, but in fact this clause does not accurately reflect the support of the agreement of the 3rd November, 1961, when it refers to rights to import and sell "Saint" brand milk because the latter agreement is for the purpose specifically only of developing the sale of "Saint" brand milk, and the only reference to importing is in general terms "generally to carry on the business of import and export merchants". What the exact effect of that agreement is in this connection it is unnecessary for me at this stage to say. Suffice it to say that if any action by the respondent has been a breach of the agreement then it is open to the applicants to sue the respondent for breach of contract.

The object of maintaining a trade marks register is that the public should know whose goods they are buying and with whom particular goods are associated. It is therefore essential that the register should not contain trade marks which are identical or which so closely resemble each other that an unwary purchaser may be likely to be deceived by thinking that he is buying the goods of a particular person or a particular firm or a particular industry, whereas he is buying the goods of another person or firm or industry. When a case is sought to be made out that a particular trade mark is likely to deceive or cause confusion the contest is not so much

between the parties to the litigation as it is a contest between the party defending his right to a particular trade mark and the public, and the duty of the court must always be to protect the public irrespective of what hardship or inconvenience it may cause to a particular party whose trade mark is likely to deceive or cause confusion. (*Ciba Ltd.* v. *M. Ramalingam & S. Subramaniam.*[1])

The public do know whose goods they are buying in the present case. They know they are buying sweetened condensed milk manufactured in the Netherlands and imported by Soo Seng & Co., Penang, because it says so on the label which contains the trade mark. The applicants have nowhere pleaded that the public are being deceived into thinking that they are buying any other sweetened condensed milk by reason of the close resemblance of this trade mark to any other trade mark applicable to sweetened condensed milk. The label which contains the trade mark informs the public that the importer of the milk is the respondent's firm, Soo Seng & Co. and so it is. The agreement of the 3rd November, 1961, refers to the development throughout the said area of the sale of the said sweetened condensed milk to be supplied by the said manufacturers under the "Saint Brand" trade mark. That is to say it is an agreement as to distribution and sale and not as to importation. Does the fact that it is not mentioned anywhere that the respondent has partners on the distribution and sale side of the business lead to the public being deceived? I cannot see that it does in any way.

In my opinion this is not a proper case in which an order should be made for rectification or variation of the register of trade marks and accordingly the motion is dismissed with costs.

Motion dismissed.

Solicitors: *V. K. Palasuntharam; Lim, Lim & Oon.*

HAJI HUSSEIN & ORS. v. THE GOVERNMENT OF THE STATE OF KEDAH & PUTEH BIN HAJI MAN

[O.C.J. (Suffian J.) December 15, 1963]

[Alor Star — Civil Suit No. 99 of 1962]

Land Laws—Arrears of quit rent water and education rates—Land auctioned by State Government—Service of notices on registered proprietors who have long since been dead—No letters of administration granted—Non compliance with statutory requirements as to service—Whether sale irregular—Substantial injury to beneficiaries of deceased proprietors—Kedah Enactment No. 56 (Land), ss.41, 113, 150 to 153, 155, 158, 159, 161, 164 & 188.

Administration—Death of registered proprietors—No letters of administration granted—Vesting of properties in Chief Justice—Probate and Administration Ordinance, 1959, s.39(1).

The first defendant auctioned two pieces of land worth about $50,000 for arrears of quit rent, water and education rates totalling $140.35 and the lands were sold at the auction for $245. These lands were each registered in the names of three proprietors all of whom had since died. The plaintiffs, four out of some eleven beneficiaries to the said lands, applied to the court to declare that the sales were null and void on the ground that the sales were irregular and that the plaintiffs had sustained substantial injury by reason of the irregularities. Counsel for the plaintiffs submitted that (i) the registered proprietors had died and therefore the lands could not be compulsorily sold for arrears of rent, there being no person on whom the statutory notices could have been served in accordance with the law; (ii) alternatively even if service of the statutory notices had been possible the land officer should have served notices in the form of Schedule XXXI; (iii) service of the notices in the form of Schedule XXXII was insufficient, there being no proper affixing of a copy at the mosque nor at the land and that the notices if served at all were served only once and should have been served again after each postponement of the auction; and (iv) the notices in the form of Schedule XXXIII though issued on June 14, 1961 were not in fact posted at the Land Office until July 21, 1961 and therefore were contrary to section 153(2) which specified the date of the action within less than 60 days of the date of the issue and posting of the notices. It was argued for the first defendant that (a) they had strictly complied with the statutory requirements; (b) the plaintiffs knew of the auction; (c) failure to serve the notices did not invalidate the sales because of section 153(3) of the Enactment; and (d) the plaintiffs' suit was statute barred by virtue of section 164(2) of the Enactment. The second defendant joined the first defendant in pleading limitation and also that he was the *bona fide* purchaser for value.

Held: (1) the death of the registered proprietors did not disable the land officer from serving the statutory notice as provided in rule 42(iv) as a prelude to auctioning the land for arrears of rent. The words "in which the noticee is known to have last resided" do not restrict the application of rule 42(iv) to cases where the registered proprietor is still living;

(2) sections 158, 159 and 161 impose a duty on the land officer to sign the memoranda of transfers and to cause the same to be registered upon the highest bidder paying the purchase price by the due date and the sale becoming final and notwithstanding the death of the registered proprietors and the absence of an administrator the appearance of the second defendant's name on the register as proprietor of the lands was lawful;

(3) the ommission by the land officer of the service of notices in the form of Schedule XXXI was not fatal to the sale;

(4) notices in the form of Schedule XXXII were properly served in respect of each land by the Land Office notice server by affixing a copy thereof on each land and by affixing another copy in a conspicuous place in the mosque in the mukim in which the lands were situate;

(5) as the notices in the form of Schedule XXXIII were issued on June 14, 1961, a copy posted at the Land Office on June 18, 1961 and at the house of the penghulu of the mukim on July 4, 1961 the date of auction (i.e. September 9, 1961) specified in the notice was not less than 60 days from the date of both issues and posting. The words "and post" immediately following the words "issue" when it first appears in section 153(1), are absent when the word "issue" appears a second time and from this it would appear that the specified date of auction must be not less than 60 days from the date of issue of the notice but it may be less than 60 days from the date of its posting;

(6) the omission of the land officer to cause service of further notices in the form of Schedules XXXII and XXXIII notifying the dates to which the auction was